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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 936

R. A. BEAVER, ET AL,
Petitioners,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF ARIZONA, URGING THAT THE WRIT OF CERTIORARI ISSUE.

DARRELL F. SMITH
THE ATTORNEY GENERAL
STATE OF ARIZONA
STATE CAPITOL BUILDING
PHOENIX, ARIZONA

Of Counsel:
DALE R. SHUMWAY
SPECIAL ASSISTANT ATTORNEY GENERAL
1624 W. ADAMS STREET
PHOENIX, ARIZONA

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INTEREST OF AMICUS

The State of Arizona is interested in this action because it owns land in the lower Colorado River area which was adversely affected by the decision below.

The State of Arizona is the record title holder of approximately 22,500 acres of land located on both sides of and within five miles of the Colorado River. This

land was ceded to the State of Arizona under the Enabling Act[1] at the time of statehood. Relying on the decision below, the United States has laid claim to some of these ceded lands. Moreover, because of the impossibility of ascertaining and assessing with any degree of accuracy the facts concerning the River's location in the period from 1912 to 1935, an irremediable cloud has been cast on the State's title to much of its land.

The State of Arizona is a party in interest with respect to claims which the United States is presently asserting against private landowners. For example, immediately after the announcement of the decision below, the United States filed an action in the United States District Court for the Southern District of California (Action No. 3370-SD-K Civil) against certain individuals seeking to eject them from and to recover damages against them for allegedly trespassing upon land which they purchased from the State of Arizona. Although the State of Arizona is not named as a defendant in said action and its interest is not disclosed on the face of the complaint, the State of Arizona has owned the land involved in fee simple since statehood, subject only to the certificates of purchase issued February 21, 1962 to some of the named defendants. The State has leased the land for grazing or agricultural purposes continually, commencing in 1912 to the date the certificates of purchase were issued. Pursuant to its certificates of purchase, the State still retains an interest in the land until the stipulated purchase prices are paid, and even thereafter, the State will retain a

[1] 36 U. S. Stat. 557, 568-579.

fractional interest in the mineral rights pertaining to the land.

The State also has an interest in maintaining its jurisdictional rights and powers with respect to that privately owned land which heretofore has always been considered to be within the State of Arizona.

REASONS FOR GRANTING THE WRIT

ARGUMENT

Seldom, if ever, has a more appealing case than this been presented to any court for application of the doctrine of equitable estoppel or a like rule of equity. It is obvious even to the casual observer that the decision of the court below perpetrates a great injustice upon these appellants. This was pointed out in the brief of amicus curiae below, which was presented by seven title companies in California, Arizona and Nevada.

Beyond the inequity perpetrated upon the petitioners in this case is the hidden application of the decision below upon the property, affairs and lives of other innocent parties who own land similarly situated along the banks of the Colorado River.

The Colorado River, up to its control in 1935, was a very erratic river. It carried large quantities of silt and annually flooded wide areas, sometimes shifting its course for considerable distances in short periods of time. Consequently, there is today a considerable quantity of land on each side of the present flow channel of the river which at some time in the past was

riparian to the River, although ascertainment of the River's banks at any given time is very difficult, if not impossible. If there were not any surcease or repose from claims to lands along the River there might well be hundreds of separate accretion claims in the area by strangers to the title and occupancy of the land involved.

There are at least three special reasons why litigation with respect to such claims should be abated. *First,* what is known about the actions of the River in its uncontrolled state confirms the most relevant fact of all in that regard: that what happened in any given instance at or during any given time is quite unknowable. At best, there is great difficulty inherent in adjudging the validity of any accretion claim. Accretion claims which could be asserted today along the Colorado River are so far removed from the actual facts causing the changes in the course of the River that discovery of relevant evidence, including eye witness testimony, is virtually impossible. Meaningful and equitable factual judgments can never be rendered in these cases. *Second,* as a result, the decisions in given cases, particularly in view of the presumption of accretion which frequently has been invoked, is more likely than in most litigation to be based on speculative interpretations of inadequate data, argumentative rather than factual presentations, with inevitable injustices, follies and consequential disrespect for the law. See *Gubzer* v. *Town,* 202 Ore. 55, 273 P. 2d 430 (1954). *Third,* the enormous expense of this kind of litigation would be ruinous for many individuals and extremely burdensome even for state agencies.

The essence of those three special considerations was authoritatively stated by the Arizona State Land Commissioner, Obed M. Lassen, in a letter to the Secretary of the Interior, dated December 14, 1962, reprinted in *Report of (Arizona) Attorney General to State of Arizona, 26th Legislature, First Regular Session on Investigation of Land Rights of the State of Arizona Along the Colorado River,* p. 6 (Jan. 4, 1963) as follows.

> "We are very reluctant to proceed with the litigation to settle the ownership of these lands because we feel that such litigation would have to be carried forward in *many separate lawsuits* and would take decades to resolve. Moreover, the settlement of such lawsuits might well result in *gross inequities* because the decisions would of necessity be made within the framework of legal restrictions and based upon indeterminate facts presented with varying degrees of persuasion by various technical witnesses to various courts. Our investigations have demonstrated to us that the fact situations in the various areas to which the Government lays claim are not identical, and that each area would have to be the subject of separate consideration and litigation. We recognize that *this would cost large sums of money for both litigants and we are extremely reluctant to impose this burden upon the taxpayers of Arizona, if there is any alternative.*
>
> "One situation is, we believe, applicable to most, if not all areas in controversy and *that is the impossibility of accurately establishing the facts."* (Emphasis supplied).

There are special reasons why the claims of the United States in particular should not be permitted to be exhumed.

First, the United States has the special responsibility of preparing and issuing maps of the area and has regularly done so. Thus, in the instant case, a map prepared by the Fish and Wild Life Service, Bureau of Sports Fisheries and Wild Life in the United States Department of the Interior in January, 1958, entitled "Cibola-Palo Verde Valley, Arizona-California, Land Ownership Status", showed the land here involved as privately owned. Record title was in the petitioner and all persons concerned had acknowledged this title from the first issuance of patent by the United States in 1914. Interested persons have been entitled to rely on what were, in effect, affirmative representations by the responsible agency of the government (the same agency directly involved in this litigation) to the effect that if any claim by the United States existed, it was not to be acknowledged.

Second, The United States is in the unique position of having in its possession files of maps which have been closed to non-federal employees in controversial cases, and a team of ready-made expert witnesses to render interpretative testimony. The United States has the statutory authority, the ability and means to make self-serving "re-surveys" whenever it suits the purpose of the United States.

Third, the United States is in the unique position of being immune from the effect of the law of adverse possession and, in addition, immune from suit. Thus, unless there is some equitable estoppel of the United States, those who own land in the River area must forever remain subject to the risk of harassment and severe economic loss by the assertion of stale claims at

times most convenient to the United States as a land proprietor-litigant.

In the circumstances described, the Court should be the more reluctant to create any wall of immunity for the federal government from the ordinary principles of equity applicable to all other litigants alike. An examination of the authorities relied upon in the opinions below compared with the many cases where equitable estoppel was applied to bar inequitable claims by the United States, is convincing that neither precedent nor reason requires or would justify any such immunity. In particular, the cases cited in petitioners' briefs below and in the petition filed with this Court make it abundantly clear that Article IV, Section 3, clause 4 of the Constitution, granting to Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," whatever its implications for the allocation of power between the Congress and the President, cannot be read to deprive the courts of the United States of their responsibility to exercise "The Judicial Power" in "Controversies to which the United States shall be a Party" [U.S. Constitution, Art. III, Sec. 2]. Indeed, were Article IV to be so read, it is not too much to say that, in a case like the present one, a conflict would be created with the specific prohibition of the Fifth Amendment against the taking of private property without just compensation. Where the United States is already favored with every advantage, including the advantage of immunity from suit to clarify record titles, it is too much to hold also that it may, with Congressional authority, publish maps and reports, inviting reliance thereon and then,

lying in wait, spring upon those who do rely thereon to seize from them what in good conscience is theirs—and, to add insult to injury, to collect damages for their good faith use of the property which all previously acknowledged was theirs. Nothing in the Constitution, nothing in law any more than in equity, requires, let alone justifies, such a result.

Indeed, it would seem that, apart from the traditional power of equity to refuse to do inequity, the Congress has provided a specific remedy in the Color of Title Act of 1928, as amended[2] which both bolsters petitioners' plea as to equitable estoppel and provides in itself a means of according recognition to petitioners' ownership of the land involved and their Fifth Amendment rights. Plainly, the Color of Title Act aims to correct inequities resulting from vagaries in the administration of the public land laws which occasionally were frustrated by administrative mistakes or confusions and to serve as a statute of repose against the United States—consistent with the design of the public land laws to encourage agricultural settlement.[3]

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[2] 45 Stat. 1069, as 67 Stat. 227 (1953), 43 USC Sec. 1068 (1964)

[3] The history of the public land laws in that regard has been traced by one writer as follows:

"Our earliest public land policy, beginning with the Northwest Ordinance of 1785, had as a major objective sale of public lands for revenue. It was when that policy, which in effect encouraged the speculative purchase and sale of public lands, failed to accomplish the effective utilization of our land as an instrument of natural growth that our laws were redesigned to encourage individual settlement of public lands. (See Clawson, "Uncle Sam's Acres," p. 45 (1951). Among the laws then passed were a series of 'preemption acts' primarily designed to accord protection to those settlers who had advanced beyond the surveyed frontier to 'squat' upon unsurveyed land not yet offered for sale, culminating in the Pre-emption Act of 1841, which provided to any squatter the prior right to purchase, at $1.25 per acre up to 160 acres of public land occupied by him. (See Wright, "Economic History of the United States" (1941).) 'The preemption law,' said Senator Scott of Indiana, was 'merely declaratory of the custom or common law of the settlers.'

The interpretation of the Act by the court below, if allowed to stand, would defeat both of those objectives. Indeed, the decision below is so extreme as to render the Act virtually useless and of no avail in a wide area of the Southwestern United States.

"Still, the insistent demands of the West (with increasing political force), the pressure of surplus labor in the cities, and the reforming idealism of easterners like George Evans and Horace Greeley combined to press for free land. (See Riegel, "America Moves West," p. 426 (3d ed. 1956); Turner, "The Significance of the Frontier in American History," p. 30 (1893).) In response, at last, Congress enacted, and in 1862 the greatest of frontiersmen, President Lincoln, signed the justly famous Homestead Act. Under that law, still a basic provision of our public land statutes, a settler could obtain patent to 160 acres of Federal land without cost upon proof (essentially) that he had resided upon or cultivated the land for 5 years." "The moving spirit of the Homestead Act is well reflected in the remarks of Senator Samuel Pomeroy speaking on its behalf in May 1862: 'Now, then, to increase the revenue of the country, add to the number of self-sustaining families of the Nation, to secure the development, growth, and happiness of a people, put a household on every quarter section.' The objective of the act, it will be seen, was, as stated by the Supreme Court of the United States, 'to secure, so far as possible, a bona fide settler on public lands, to promote the peopling and cultivation of those lands.'

"In the years which followed, despite the rigid settlement of the rich heartland of the country, Congress, far from reversing the land disposal policy of the Homestead Act, sought to expand it by enacting more liberal provisions with respect to the remaining public lands susceptible of agricultural development. Particularly important to the Southwest was the Desert Land Act of 1877, which allowed up to 640 acres in any of the 11 Western States and territories to any person who would enter and provide irrigation for the land; the Carey Act of 1894, which made available some 14 million acres to the States on the condition that they develop irrigation enterprises for homestead settlements; and the Reclamation Act of 1902 . . . .

"The Reclamation Act of 1902 was enacted to help overcome the formidable problems of private settlement and cultivation of the arid and semi-arid West by providing for construction by the Federal Government of irrigation works or projects upon easy, long-term repayment by the settlers.

" . . . As the biographer of the remarkable public servant who was the originator and prophet of much of our Federal land policy today, John Wesley Powell, put it, the act was written 'in the interest of the Jeffersonian yeoman and the 160-acre farmstead' (Stegner, "Beyond the Hundredth Meridian," p. 366 (1954))."

See Hearings before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 87th Cong., 1st Sess., ser. 17, at 94, 100-101 (1962).

It is unfortunately true that, as a result of the depression of the 1930's, followed by World War II, a considerable quantity of agricultural land along the Colorado River was taken over on behalf of the State because of the non-payment of taxes. The court below refused to countenance the possession by the State of Arizona of the land involved during the years 1940-1942. The court below also refused to recognize the occupancy of the land by any of its occupants after 1930 because of the general withdrawal order of the Secretary of the Interior pertaining to other land in 1929. It is deserving of note that in 1960 at least 732,000 acres in the lower Colorado River area were still held by the federal government in withdrawn status. Thus, the ruling of the court below can be utilized by the United States virtually to nullify the Color of Title Act in the lower Colorado River area.

CONCLUSION

The decision of the lower court has far-reaching effects upon the future course of development of a wide area in the Southwest.

This case presents a clear question as to the proper administration of justice by the United States relating to claims it may make to lands held by private individuals. Because of the complexity of the facts in this case and other cases which have already arisen, private litigants are forced into a position which is economically impossible to defend. There are presently pending in the federal courts within the States of Arizona and California as many as fifteen cases involving basically the same question presented in this case. Justice dictates that the petitioners as well as other landowners should not be forced to expend money in defense of these suits.

For these reasons, the Writ of Certiorari in this matter should be issued.

Respectfully submitted,

DARRELL F. SMITH
The Attorney General
State of Arizona

Of Counsel:

DALE R. SHUMWAY
Special Assistant Attorney General
1624 West Adams Street
Phoenix, Arizona 85007